Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

April 2005

Supreme Court mandates leniency for those who appeal from the wrong order. An order denying a new trial is not an appealable order. *Rodriguez v. Barnett* (1959) 52 Cal.2d 154, 156, [338 P.2d 907]. But such an order may be reviewed in an appeal from the judgment. *Civ. Proc.* § 906. In *Walker v. Los Angeles County Metropolitan Transp. Authority* (Cal.Supr.Ct.; February 3, 2005) 35 Cal.4th 15, [23 Cal.Rptr.3d 490, 2005 DJDAR 1423], after a defense verdict and an unsuccessful motion for a new trial, plaintiff filed a notice of appeal from the order denying the new trial. The Court of Appeal dismissed the appeal as being from a non-appealable order. The California Supreme Court reversed, holding that under *Cal. Rules of Court*, rule 1(a)(2), which requires that notices of appeal be liberally construed, the appellate court should have treated the notice of appeal as being from the judgment.

Successive motions for summary judgment are prohibited absent new facts or law. Although *Code Civ. Proc.* § 1008 purports to limit the courts' jurisdiction to reconsider its rulings, cases have consistently held that this limitation violates the separation of powers and that courts have the inherent power to correct their own mistakes. (*See e.g., Scott Co. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 Cal.App.4th 197, 207 [132 Cal.Rptr.2d 89, 2003 DJDAR 3245]; *Remsen v. Lavacot* (2001) 87 Cal.App.4th 421, 426-427 [104 Cal.Rptr.2d 612, 2001 DJDAR 2165]. Some cases have limited this holding to situations where the court acts *sua sponte* and do not permit reconsideration on a party's motion unless the requirements of section 1008 are met. (*See e.g., Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, [130 Cal.Rptr.2d 754, 2003 DJDAR 1908]. At least one case has stated that this is a "distinction without a difference" and permits reconsideration of a previously made motion at any time on the motion of a party. (*Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031, 1042, [126 Cal.Rptr.2d 310, 2002 DJDAR 11890].

The Court of Appeal for the Second District endorsed the latter view in *Schachter v. Citigroup, Inc.* (Cal. App. Second Dist., Div. 7; February 8, 2005) 126 Cal.App.4th 726, [23 Cal.Rptr.3d 920, 2005 DJDAR 1593]. But the case adopted a different rule for summary judgment motions. Subdivision (f) (2) of the summary judgment statute (*Code Civ. Proc.* § 437c) prohibits a "party" from renewing a motion for summary judgment absent new facts or new law. The statute does not prohibit a court from correcting its ruling on a motion for summary judgment at any time and therefore does not purport to limit the court's jurisdiction to correct its mistakes. Under the specific statute limiting a party's right to renew a motion for summary judgment, the court erred in granting such a motion where the prior motion, based on the same facts and law had been denied.

Traffic on the Ventura freeway may be bad; but it doesn't justify a change of venue. A Los Angeles court did not err in denying a motion for change of venue on ground of inconvenient forum to a Ventura resident who, in part, based his motion on the "hassle" of having to drive all the way from Ventura to Los Angeles. *LLP Mortgage v. Bizar* (Cal. App. Second Dist., Div. 4; January 24, 2005) 126 Cal.App.4th 773, [24 Cal.Rptr.3d 598, 2005 DJDAR 1671].

Courts are split on whether Proposition 64 applies to pending cases. In our last newsletter we noted that under Proposition 64, adopted by the voters last November 2, private litigants may no longer bring an action under *Bus. & Prof. Code* § 17200 *et seq.*, unless they have "suffered injury in fact and [have] lost money or property as a result of such unfair competition." *Bus. & Prof.* § 17204. The amendment also requires that such a litigant "complies with [*Civ.Proc.*] section 382 [the class action statute]." *Bus. & Prof.* § 17203. Do these amendments apply to cases in which no final judgment had been entered by November 2, 2004?

Litigation Section Events

Annual Trial Symposium

April 15–17, 2005
Silverado Country Club and Resort
Napa Valley, CA

See details at www.calbar.org

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Participate In The Discussion Board Excitement

See what all the excitement is about! If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board at: http://members.calbar.ca.gov/mb/ShowForum.aspx?ForumID=13

Remember to first fill out the Member Profile to get to the Discussion Board!

When we prepared this edition, five cases had weighed in on the issue and reached differing conclusions. *Californians for Disability Rights v. Mervyn's* (Cal. App. Fourth Dist., Div. 4; February 1, 2005) 126 Cal.App.4th 386, [24 Cal.Rptr.3d 301, 2005 DJDAR 1347], concluded that pending cases are not subject to the new standing requirements. The other four cases reached the opposite result.

Branick v. Downey Savings and Loan Assn. (Cal. App. Second Dist., Div. 5, February 9, 2005) 126 Cal.App.4th 828, [24 Cal.Rptr.3d 406, 2005 DJDAR 1665], held that the amendment does apply to pending cases and remanded the case to the trial court to permit plaintiffs, who did not qualify under the amendment, to substitute other plaintiffs who would qualify.

Benson v. Kwikset Corporation (Cal.App. Fourth Dist., Div. 3: February 10, 2005) 126 Cal.App.4th 887, [24 Cal.Rptr.3d 683, 2005 DJDAR 1726] similarly concluded that the limitations of Proposition 64 apply to pending cases. It remanded the case to the trial court to permit plaintiff to seek an amendment to his complaint if he could demonstrate he was qualified to pursue the action under the amended statute. But *Benson* ruled that plaintiff could not cure the defect in standing by substituting another person or entity as plaintiff because the statute of limitations would have run on their claims.

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Jury Instructions

We would like to hear about any problems or experiences you've had with the new jury instructions. Please provide your comments by sending them to Paul Renne at PRenne@cooley.com or to Rick Seabolt at RLSeabolt@HRBlaw.com

Two other cases held that Proposition 64 applies to pending cases: *Bivens v. Corel Corp.* (Cal. App. Fourth Dist., Div. 1; February 18, 2005) 126 Cal.App.4th 1392, [24 Cal.Rptr.3d 847, 2005 DJDAR 2014] and *Lytwyn v. Fry's Electronics, Inc.* (Cal. App. Fourth Dist., Div. 1; February 22, 2005) 126 Cal.App.4th 1455, [___Cal.Rptr.3d___, 2005 DJDAR 2087). We expect the California Supreme Court to grant review in some or all of these cases and the ultimate answer to the issue must await that court's decision.

When seeking credit information, you had better be very specific in your inquiry. Several out of state cases have held that where financial institutions furnish erroneous credit information about depositors, they may be liable to inquirers who, in reliance on the information, extend credit to the depositors. *See e.g., Central State Stamping Company v. Terminal Equipment Co., Inc.* (6th Cir., 1984) 727 F.2d 1405; *Berkline Corp. v. Bank of Mississippi* (1984) 453 So.2d 699.

But, in *Lease and Rental Mgt. Corp. v. Arrowhead Central Credit Union* (Cal. App. Fourth Dist., Div. 2; February 14, 2005) 126 Cal.App.4th 1052, [24 Cal.Rptr.3d 483, 2005 DJDAR 1819], the Court of Appeal distinguished these cases by noting that in all of them the banks were directly involved in the operations of the depositor. In affirming summary judgment for the credit union, the court also noted that "the inadequacy of the credit reference request forms used by [plaintiff] are the root of the problem." The forms were incomplete and likely to confuse the bank employees who were requested to fill them out.

While conducting a settlement conference, judge may not make factual findings or prepare a coercive order. In *Travelers Casualty and Surety Co. v. Superior Court* (Cal. App. Second Dist., Div. 8; February 15, 2005) 63 Cal.App.4th 1440, [75 Cal.Rptr.2d 54, 2005 DJDAR 1869], the trial judge, while conducting a settlement conference, issued a written order (1) determining the good faith settlement value of the cases, (2) precluding plaintiffs from declaring a forfeiture of their policies if the insured settled without their consent, and (3) providing evidence of the insurers' bad faith "for future use." Invoking the provisions of the Evidence Code relating to mediation (*Evid. Code* §§ 1115–1128), the Court of Appeal reversed these orders. The appellate court ruled that fact finding and other coercive conduct by a mediator was prohibited.

Class action lawyer for plaintiffs may not also be counsel in the suit. In *Apple Computer, Inc. v. Superior Court* (Cal. App. Second Dist., Div. 1; February 17, 2005) 126 Cal.App.4th 1253, [24 Cal.Rptr.3d 818, 2005 DJDAR 1971], a lawyer, was also named as a plaintiff within the class. The lawyer was represented by his own firm. The court held that there was a conflict that mandated the firm be disqualified. As a representative of the class, plaintiff was obligated to seek the maximum recovery for the class; but the firm where he was employed may have had an interest in maximizing its fees.

Notice of Errata in March Issue of Litigation Update

Please note there was an error on page two in the section "New and Amended Statutes…" regarding homeowners' association's dispute procedures. The correct citation is *Civ. Code* § 1363.810 *et seq.*, not *Civ.Proc.* § 383, as printed. Thanks to attorney Gregg McKerroll for bringing the error to our attention.